Watada v. Head et al Doc. 5

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

1LT EHREN K. WATADA,

Petitioner,

vs.

LT. COL. JOHN HEAD, Military Judge, Army Trial Judiciary, fourth Judicial District; LT. GEN. CHARLES JACOBY, Convening Authority, Ft. Lewis, Washington;

Respondents.

NO. C07-5549 BHS

PETITIONER'S SUPPLEMENTAL AUTHORITIES IN SUPPORT OF EMERGENCY MOTION FOR STAY

A. Soldier/Officer Distinction Irrelevant

Yesterday in open Court the Government argued that case law pertaining to enlisted military personnel was not applicable to this case because Petitioner Watada is in officer.

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The case of *Strait v. Laird*, 406 U.S. 341 (1972) demonstrates that the Government is not correct. In *Strait*, the habeas petitioner was an Army Reserve officer challenging the Army's legal authority to order him to report for active duty. Petitioner Strait filed his § 2241 habeas petition in a federal district court in California. He named as the respondent the commanding officer who was in charge of all reserve officers. That commanding officer was physically located in Indiana.

The Army contended that since the respondent was physically located in Indiana, the California district court did not have jurisdiction to hear the habeas petition because it should have been filed in Indiana. The United States Supreme Court rejected this contention, holding that the superior officer in Indiana exercised control over the Petitioner by acting through subordinate officers in California, and therefore the suit was properly filed and heard in a federal district court in California.

The *Strait* opinion states in pertinent part:

> The concepts of custody and custodian are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction.

Strait, 406 U.S. at 345. (In the present case there is no dispute over the fact that both named respondents are physically located within the Western District of Washington.)

The Supreme Court concluded that the California district court had jurisdiction over the habeas petition:

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> We hold only that there is jurisdiction under 28 U.S.C. § 2241(c)(1) for consideration of this habeas petition for decision on the merits.

Strait, 406 U.S. at 346.

Thus, the Government's contention that § 2241 habeas jurisdiction only exists in cases involving enlisted men is clearly incorrect.

In *Glazier v. Hackel*, 440 F.2d 592 (9th Cir. 1971), the Ninth Circuit noted:

> Certainly the writ's great purpose is to test the lawfulness of restrictions upon personal freedom, and both the jurisdictional statute (28 U.S.C. § 2241) and the history of habeas corpus require that the petitioner be 'in custody' when the application is filed. *United States ex rel. Carafas v. La Vallee*, 391 U.S. 234, 238, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); *Peyton v. Rowe*, 391 U.S. 54, 58-59, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). The 'custody' requirement is satisfied, however, by the restraints incident to military service.
>
> It is clear from recent Supreme Court decisions that it is not a bar to habeas corpus that a ruling favorable to the petitioner will not result in his release, for, as the statute states, the habeas court is broadly empowered to 'dispose of the matter as law and justice require.' 28 U.S.C. § 2243.
>
> In *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953), the Court considered the merits of a habeas corpus petitioner's claim that he was entitled to be placed in a particular classification or category for military duty purposes even though he requested discharge only in a conditional sense- only if the Army did not assign him to duties within his proper classification. Thus *Orloff* is authority that habeas corpus is appropriate even though the petitioner does not seek, nor would a favorable decision grant, release from all 'custody.' Similarly, in *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), and *Ex Parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941), the Court examined prison regulations on their merits and held them invalid in habeas proceedings initiated by prisoners, although the regulations' invalidity did not result in the prisoners' discharge.

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Glazier, supra, 440 F.2d at 594-95.

B. In Addition to Being in Custody Because he Is Being Retained in the Armed Forces, Petitioner is Also in Custody Because He Is Being Held to Answer on Criminal charges and Is required to Appear in Court.

Yesterday in open Court undersigned counsel represented to the Court that it was well-established that being held to answer on pending criminal charges is a form of custody that may be challenged by way of a habeas corpus petition, and promised to supply authority for that point. That authority would be *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 300-301 (1984). There the Supreme Court held:

> Our cases make clear that the use of habeas corpus is in actual, physical custody." [Citations]. In *Hensley v. Municipal Court*, 411 U.S. 345 (1973) we held that a petitioner enlarged on his own recognizance pending execution of sentence was in custody within the meaning of 28 U.S.C. § § 2241(c)(3) and 2254(a). Hensley's release on personal recognizance was subject to conditions that he would appear when ordered by the court . . . Although the restraints on 2241(c)(3) and 2254(a). Hensley's release on personal recognizance was subject to conditions that he would appear when ordered by the court . . . Although the restraints on Lydon's freedom are not identical to those imposed on Hensley, we do not think that they are sufficiently different to require a different result.
>
> The Massachusetts statute under which Lydon was released subjects him to restraints not shared by the public generally. [Citation]. He is under an obligation to appear for trial in the jury session on the scheduled day and also "at any subsequent time to which the case may be continued . . . and so from time to time until the final sentence. . . . Consequently we believe that the Court of Appeals correctly held that Lydon was in custody.

Petitioner Watada is under the identical type of restraint. He must appear for his court martial trial scheduled to start next Tuesday and at all subsequent court-martial

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proceedings. Thus, that is a second, independent form of custody that can and is challenging by way of a habeas corpus petition.

C. Habeas Corpus Jurisdiction Under Section 2241 To Hear Pretrial Claims of Double Jeopardy Is Recognized In Several Circuits In Addition to the Ninth Circuit.

In *Stow v. Murashige*, 389 F.3d 880 (9th Cir. 2004) the Ninth Circuit explicitly held that § 2241 confers habeas corpus jurisdiction to hear pretrial claims that double jeopardy would be violated by the holding of a second trial:

> [W]e hold that Stow's habeas petition is properly considered under 28 U.S.C. § 2241, not § 2254, because at the time Stow filed his petition he was not "in custody pursuant to the judgment of a State court." Thus, to obtain habeas relief he need only show that a retrial would violate his right against double jeopardy.

Stow, 389 F.3d at 882.

All the Circuits that have addressed this issue have come to the same conclusion. *Jacobs v. McCaughtry*, 251 F.3d 596 (7th Cir. 2001) (per curiam); *Benson v. Superior Court*, 663 F.2d 355, 358 (1st Cir. 1981); *Stringer v. Williams*, 161 F.3d 259, 261-62 (5th Cir. 1998) (reversing district court's dismissal of petition) ("Stringer filed an application, which he styled as being pursuant to 28 U.S.C.§ 2241, in federal district court challenging the pending prosecutions. He contended that the state was barred on double jeopardy grounds from prosecuting him for the two offenses . . . We therefore must determine first , whether Stringer's petition is properly characterized as a § 2242 petition. We think that it is. . . [W]e should construe Stringer's filing as a habeas petition with § 2241 as the jurisdictional

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basis."); *Palmer v. Clarke*, 961 F.2d 771, 772 (8th Cir. 1992) ("It is well established that federal district courts can entertain pretrial habeas petitions in which the petitioner asserts an impending state trial violates the Double jeopardy Clause.").

Finally, petitioner Watada notes that in *Lydon* the habeas petitioner sought and obtained habeas review of the exact same type of constitutional claim and at the same stage of the proceedings. He sought and obtained pretrial habeas review of his claim that his second trial was barred by the Double Jeopardy Clause. Although he lost on the *merits* of his claim, no one ever questioned his right to seek habeas review of that claim pursuant to 28 U.S.C. § 2241, even though his habeas was brought and litigated prior to trial. The Supreme Court said:

> Because the Clause "protects interests wholly unrelated to the propriety of any subsequent conviction," [citation], a requirement that a defendant run the entire gamut of state procedures, including retrial, prior to consideration of his claim in federal court,. Would require him to sacrifice one of the protections of the Double Jeopardy Clause.

Lydon, 466 U.S. at 303.

D. Conclusion

Petitioner respectfully submits that these additional authorities also support his motion for a stay of the court-martial proceedings and demonstrate that this Court clearly does have jurisdiction over this habeas corpus petition pursuant to 28 U.S.C. § 2241.

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DATED this 5th day of October, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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